IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1188 of1999

For Approval and Signature:

HONOURABLE MR.JUSTICE A.L.DAVE
HONOURABLE MR.JUSTICE SHARAD D.DAVE

==========

1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

==========

RAMESHBHAI MOHANBAHI VASAVA & 3 - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

==========

Appearance :
MR BS PATEL with MRS RANJAN B PATEL for the Appellants.
MR PD BHATE, APP, for Respondent State.
MR PRANAV M RAVAL for the Original Complainant.

==========

CORAM : HONOURABLE MR.JUSTICE A.L.DAVE

and

HONOURABLE MR.JUSTICE SHARAD D.DAVE

Date : 18/06/2007

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE A.L.DAVE)

1. The appellants along with one accused-Kanubhai Bijalbhai came to be tried by Sessions Court, Bharuch, for offences punishable under Sections 147, 148, 149 of Indian Penal Code ("I.P.C." for short); 147, 148, 149 read with Sections 302, 307 and 34 of I. P. C. as well as for offences punishable under Sections 302 and 307 of I. P. C. and Section 135 of the Bombay Police Act in Sessions Case No.240 of 1996. The Sessions Court, by judgment and order dated 20th August, 1999, acquitted original accused No.5-Kanu Bijal disbelieving his presence at the time and place of incident. The Sessions Court, however, convicted accused Nos.1 to 4 (present appellants 1 to 4) for offence punishable under Section 302 read with Section 34 of I. P. C. and sentenced all of them to imprisonment for life and a fine of Rs.500/- payable by each of them, in default, to undergo simple imprisonment for one month. The Sessions Court also convicted original accused Nos.2, 3 and 4 (present appellants 2, 3 and 4) for offence punishable under section 324 read with section 34 of I. P. C. and sentenced them to undergo rigorous imprisonment for three months and, hence, this appeal.

2. The prosecution story, in brief, is that the incident in question occurred on 26th July, 1996, at about 14.45 hours in the outskirts of village Bhimpor, in the field of Mohanhai Upalabhai

Vasava. It is alleged that, while deceased-Ashwinbhai Simonbhai and Amarsing Mohanbhai were returning to village, the appellants intercepted them and committed assault on Ashwin Simon where accused No.1 (A1) inflicted a blow with axe on shoulder of Ashwin. Ashwin, therefore, started running. As per the prosecution case, the acquitted accused-original accused No.5(A5), Kanu Bijal, was waiting near the field on his motorcycle and he instigated the accused persons to see that Ashwin Simon does not escape. It is the case of the prosecution that, thereafter, appellants 3 and 4 – Manubhai Mohanbhai and Bhayaji Muljibhai, respectively, committed assault on the deceased with stick, as a result, the deceased fell down. At that point of time, appellant No.2-Manilal Mohanbhai inflicted a blow with an axe on neck of the deceased causing a fatal injury. Witness-Amarsing Mohanbhai was also assaulted upon where appellant No.2 caused head injury to Amarsing with an axe whereas appellant No.4 caused injuries on leg and head of injured Amarsing and accused No.3 (appellant No.3) caused hurt on wrist of Amarsing.

2.1 The incident was witnessed by Arvindbhai Chhitubhai Vasava (P.W.1), Amarsing Mohanbhai (the injured witness), Maganbhai Jatariyabhai and Pravinbhai Mansukhbhai. They have been examined before the Trial Court at Exhibits 26, 42, 44 and 44, respectively.

2.2 The incident has its roots in an incident that occurred 4/5 days prior to the incident, where it is alleged that the deceased and others had set the house of the accused ablaze and the house

was destroyed.

3. The Trial Court accepted version of the eye-witnesses that because of rains on the day of incident, it was not possible to ply motorcycle near the place of incident and, therefore, disbelieved the case of the prosecution about presence and instigation by original accused No.5-Kanubhai Bijalbhai and recorded his acquittal.

3.1 The Trial Court believed the version of eye-witnesses and accepted the other pieces of evidence and came to a conclusion that original accused Nos.1 to 4 (present appellants) did not share a common intention. However, the Trial Court, ultimately, came to a conclusion that they shared a common intention and recorded conviction of the appellants-original A1 to A4 for offence punishable under Section 302 read with Section 34 of I. P. C., as stated above.

3.2 The Trial Court also accepted the prosecution case that A2 to A4 shared common intention to cause hurt and, therefore, recorded conviction for offence punishable under Section 324 read with Section 34 of I. P. C. The Trial Court, however, since it disbelieved presence of Accused No.5-Kanubhai Bijalbhai, recorded acquittal for rest of the charges under Sections 147, 148 and 149 of I.P.C. so also Sections 147, 148, 149 read with Sections 302 and 307 of I.P.C., and Section 307 of I. P. C. The Trial Court also acquitted the accused persons for the offence punishable under Section 135 of the Bombay Police Act and sentenced them to

undergo rigorous imprisonment for life and to pay a fine of Rs.500/- each, in default, to undergo simple imprisonment for one month for offence punishable under Section 302 read with Section 34 of I.P.C. and rigorous imprisonment for three months for offence punishable under Section 324 read with Section 34 of I. P. C.

4. We have heard learned Advocate, Mr. B. S. Patel, for the appellants, learned Additional Public Prosecutor, Mr. Bhate, for the respondent-State and learned Advocate, Mr. Pranav Raval, for the original complainant.

5. Learned Advocate, Mr. B. S. Patel, for the appellants submitted that on the one hand, the Trial Court concluded that the accused persons did not share any common intention and, on the other hand, the Trial Court records conviction of the appellants for offence punishable under Section 302 read with Section 34 of I.P.C. and under Section 324 read with Section 34 of I.P.C.

5.1 Mr. Patel submitted that the evidence, if perused, would indicate that the deceased and his companions were passing by the place of incident without any previous information or notice and, therefore, it cannot be inferred that the appellants were waiting for the deceased to come, so that they can assault him. The weapons used in the commission of the offence are axe and Dharias. Both these categories of weapon can be considered as agricultural implements. The appellants are agriculturists and their possession of such an instrument in field may accepted as a natural phenomena. Mr. Patel submitted that the Trial Court has

disbelieved presence of original accused No.5. Differently put, the prosecution can be said to have improved its case and, having noticed that part, the Court recorded acquittal of A5 and acquittal of the appellants for other charges. The investigation, therefore, cannot be considered as unbiased or efficient. The Trial Court ought not to have placed reliance on evidence of eye-witnesses and ought to have recorded acquittal of original A1 to A4 (present appellants). If the prosecution could have improved upon presence of original accused No.5, they could have very well improved the evidence regarding other assailants. The Trial Court has overlooked these aspects and has recorded conviction which is an error and, therefore, the appeal may be allowed.

5.2 It was submitted that there are several other factors which the Trial Court has ignored, namely, that although the prosecution case is that the first blow given to the deceased was by A1 with an axe, which landed on his shoulder, the medical evidence does not speak of any injury on shoulder, although there is an injury on biceps. Mr. Patel submitted that A1 to A4 have actively participated in the incident, but that action cannot be inferred as to share any common intention of causing murder of the deceased. The parties had animosity but they were inter-related and could not have shared common intention to murder. The Trial Court has not properly reasoned out as to why intention to cause murder is believed by it while recording conviction of the appellants under Sections 302 read with Section 34 of I. P. C. Mr. Patel submitted that A2 is the person who has caused fatal injuries even as per the prosecution case. He also submitted that A1, A3 and A4 can be said

to have caused hurt to the deceased and the witness. At the most, they can be said to have shared a common intention of teaching a lesson to the deceased, but not of causing his murder. The Trial Court has not given a specific finding as to the injuries having caused to the deceased and has recorded conviction for injuries caused to injured eye-witness, Amarsing Mohanbhai. It was, therefore, submitted that there are several mistakes committed by the Trial Court and, therefore, the appeal may be allowed by setting aside the conviction.

5.3 Alternatively, it was pleaded that conviction of A2, A3 and A4 under Section 302 read with Section 34 may be set aside upholding conviction for offence punishable under Section 324 read with Section 34 of I. P. C. and the appeal may be allowed.

6. Learned Additional Public Prosecutor, Mr. Bhate, has opposed the appeal. According to the learned Additional Public Prosecutor, the Trial Court was justified in recording conviction under Section 302 read with Section 34 of the Indian Penal Code. Sharing common intention is a mental process and there cannot be any direct evidence, but the evidence on conduct of the appellants would clearly go to show that the appellants had common intention to cause murder. It was submitted that intention may be crept in at any time even during transaction and if this aspect is kept in mind while considering the conduct of the appellants at the time of the incident, it would be clear that they did share a common intention. The first blow is given by A1 with an axe on the shoulder followed by hurt being caused by A3 and A4 with sticks and still further

followed by the fatal injury being caused to the deceased by A2 on a vital part of the body which, ultimately, resulted into his death. It was, therefore, submitted that the conviction has been rightly recorded.

7. We have taken into consideration rival side contentions and have examined the record and proceedings. From the record, we find that Arvindbhai Chhitubhai Vasava (Exhibit 26), Amarsing Mohanbhai (Exhibit 42), Maganbhai Jatariyabhai (Exhibit 44) and Pravinbhai Mansukhbhai (Exhibit 45) are the witnesses, who are examined by the prosecution as eye-witnesses. Out of these witnesses, Amarsing Mohanbhai is an injured eye-witness, who sustained injuries in the transaction in question. These witnesses have been examined at Exhibit 26, 42, 33 and 45, respectively.

8. We find from the evidence that the appellants actively participated in the incident. A3 and A4 caused injury to the deceased with stick while A1, initially, gave an axe blow on shoulder of the deceased, where A2 caused injury on back of the neck of the deceased which proved to be fatal. It also appears that an axe injury is alleged to have been caused by A2 on head of Amarsing whereas A4 and A3 have caused injury on leg and hand of Amarsing.

8.1 It is alleged that A1 caused injury to deceased on shoulder. However, the medical evidence does not fully corroborate this version of eye-witnesses in the sense the injury is noticed on biceps. However, in our view, this discrepancy cannot

be given much weightage for the reason that when such an incident occurs, a person may not have chance or sometimes even ability to observe everything that happens in quick succession. The fact, however, remains that an injury was found on biceps of the deceased attributable to an axe.

8.2 It emerges from evidence of these eye-witnesses that there is no evidence to infer that the deceased and injured witness had preplanned their visit and that they were likely to pass by the place where the incident has occurred. It is not the case of the prosecution either that their programme or schedule was known to the appellants. It has also come in evidence of the eye-witnesses that all the four appellants were in the field and were scattered. At that point of time, suddenly, the deceased and the injured witness come to the spot and suddenly A1 commits assault on them with an axe. There was no quarrel, no altercation, no scuffle nothing. Suddenly A1 pounces on the deceased and causes injury on his shoulder (biceps) and then when the deceased starts running, A3 and A4 commit assault on him with sticks, as a result of which, he falls to the ground and, then A2 comes into the picture and causes the fatal injury. The version that original A5 instigated rest of the accused to commit assault and cause his murder has not been believed by the Trial Court and he has been acquitted. Against that acquittal, no appeal or revision is preferred.

9. Now, therefore, when four persons were working separately in the field at a distance from each other and when the incident occurs, it cannot be said that they had any common

intention at that point of time. The fact that they were not working may not be of any significance for inferring that they nurtured and shared a common intention in backdrop of the fact that the programme or schedule of the deceased and his companion was not preplanned nor is there any evidence to infer that it was known to the assailants. What is, therefore, significant is that they all were working scattered in the field and A1 committed the first assault. There is no material to infer that they had any talk interse there before on seeing the victim. Thereafter, it is alleged that A3 and A4 committed assault on the deceased as he was trying to escape, as a result of which, he fell down. If medical evidence is seen, the external injuries noticed except injuries No.4 and 2 were either contusion or contused lacerated wound on non-vital part of the body, namely, legs, thigh and back. It is after this point of time (assault by A1, A3 and A4) that A2 comes into picture and gives the fatal blow on back of the neck of the deceased. In our view, therefore, even if the incident is viewed in the backdrop of the past incident which occurred about four days prior to the incident, the accused can be inferred to have shared a common intention of teaching the victims a lesson. As such there was no time for them to have a common intention or to share a common intention or to decide the act in furtherance of that common intention to commit murder. It was only when A1 committed assault on the deceased that A3 and A4 acted in his support. None of them have caused any injury which may endanger human life. In our opinion, therefore, A1, A3 and A4 could not have been convicted for offence of murder by deriving support from Section 34 of I. P. C. The Trial Court was, therefore, in error to the extent that it convicted A1, A3 and A4 for

offence punishable under Section 302 of I. P. C. and that conviction, therefore, deserves to be set aside.

9.1 However, we find from the evidence of eye-witnesses that Amarsing was assaulted upon by A2 with an axe on his head, where A4 caused hurt to Amarsing with a stick on his leg and head and A3 assaulted witness-Amarsing with a stick and caused hurt on his arm. If injuries in this regard are seen, Amarsing had sustained injury on right side of his head, where CLWs were noticed. Rest of the injuries except injury No.2 were simple in the form of abrasions or contusions. There was a contusion on left side of the forehead and fracture on left knee. The evidence of the eye-witnesses despite a close scrutiny does not disclose exactly as to who caused injury No.7, namely, fracture of left knee of Amarsing.

10. The upshot of the above discussion of evidence is that grievous hurt was caused to Amarsing Mohanbhai Vasava. However, the Trial Court has convicted the appellants for causing simple hurt with deadly weapons and has convicted the appellants for offence punishable under Section 324 read with Section 34 of I. P. C. We find some justification in the submission made by learned Additional Public Prosecutor that the conviction ought to have been under Section 326 read with Section 34 of I. P. C. However, since no appeal has been preferred against conviction under Section 324 read with Section 34 of I. P. C. praying for altering it into one under Section 326 read with 34 of I.P.C., we deem it proper not to interfere with the finding of the Trial Court so far as conviction under Section 324 read with Section 34 is concerned.

11. So far as conviction of appellant No.2-Manilal Mohanbhai is concerned, his conviction has to be altered to one under Section 302 of I. P. C. from conviction under Section 302 read with Section 34 of I. P. C. The evidence is clear that there was no quarrel or altercation between the parties before the assault. The deceased was, initially, assaulted upon by A1. Thereafter, he tried to escape, but he could not because of blows being given by A3 and A4 with sticks. It has also come in evidence that because of the stick blows, the deceased fell on the ground and, at that time, A2 inflicted an axe blow on back of neck of the deceased. The medical evidence indicates that, that was a fatal blow. If the description of the injury is seen, it describes thus :-

> *"(4) Horizontal incised wound on the back of the neck. The S.C. tissue muscles and C4 vertebra were cut through in the same direction.*

Neck is a vital part of the body. The injury was caused by A2 with an axe. The injury was caused while the deceased was lying on the ground and the blow was given with such a force that C4 vertebra was cut through. The injury is medically opined to be sufficient in ordinary course of nature to cause death. When a man gives blow with an axe with such a force on vital part of the body while the deceased was lying on the ground helpless and undefended, there is no scope for any other inference but to infer that the assailant had intention to cause death of the deceased. This has to be viewed keeping in light the fact that four days prior to the incident, the

deceased allegedly set the house of A2 to fire, in respect of which an F.I.R. was also lodged. Thus, A2 had motive and did act in a manner which would clearly show his intention to cause death. We are, therefore, of the view that conviction of A2 has to be altered from one under Section 302 read with Section 34 to Section 302 of I. P. C.

11. As a result of the foregoing discussion, the appeal is partly allowed. The conviction of A2 to A4 for offence punishable under Section 324 read with Section 34 is confirmed. Conviction of A1 to A4 under Section 302 read with Section 34 of I. P. C. is hereby set aside and A2 is convicted under Section 302 of I. P. C. Conviction of A1 is altered to one under Section 326 read with Section 34 of I. P. C. in light of the fact that witness-Amarsing has sustained fracture on his leg, which would fall within the definition of grievous hurt.

12. We are informed that A3 and A4 have been released on bail. Their bail bond shall stand cancelled. Learned Additional Public Prosecutor is not in a position to state as to how much sentence have these two appellants served. Under the circumstances, A3 and A4 are directed to surrender to custody, if they have not undergone the sentence awarded by the Trial Court. So far as appellant No.2 is concerned, his sentence of imprisonment and fine stands confirmed. So far as appellant No.1 is concerned, he is still in jail. He is convicted under Section 326 read with Section 34 of I. P. C. and is sentenced to undergo imprisonment for the period which he has already undergone. There shall be no

change in the order relating to fine imposed on him by the Trial Court.

[A. L. DAVE, J.]

[S. D. DAVE, J.]

gt